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PACIFIC & ORIENT INSURANCE CO SDN BHD

v.

CHENG CHOR TONG & ORS

B

HIGH COURT MALAYA, KUANTAN
HELILIAH MOHD YUSOF J
[CIVIL APPEAL NO: 12-11-1999]
22 MAY 2006

C ***CIVIL PROCEDURE:*** *Estoppel - Estoppel by representation - Requirements - Representation of fact made and acted upon - Representation must be clear and unequivocal*

D ***CIVIL PROCEDURE:*** *Estoppel - By conduct - Where a person by his declaration/act/omission intentionally causes another to believe a thing and to act upon such a belief - Representation by conduct must be sufficiently unequivocal - Evidence Act 1950, s. 115*

CIVIL PROCEDURE: *Estoppel - Estoppel against statute - Whether estoppel by representation can be raised to negate operation of a statute*

E Pursuant to a motor vehicle accident, the appellants/defendant's solicitors requested a copy of the RIMV Certificate on motor car number WAA 5300 in order to enable the defendant to confirm coverage. The respondents/plaintiffs' solicitors sent a copy of the Jabatan Pengangkutan Jalan search report (P1). On 16 March 1992 a civil suit was instituted against the tortfeasors and the defendant's solicitors entered appearance F and filed the defence. On 21 March 1992 the defendant's solicitors informed the plaintiffs' solicitors that the said vehicle was not insured by the defendant and requested for a copy of the alleged insurance cover note. The plaintiffs' solicitors replied that they did not have a copy of the client's cover note. On 12 October 1994 the Sessions Court Judge G gave decision on the question of liability.

On 1 June 1995 an action was filed against the defendant pursuant to s. 96 of the Road Transport Act 1987 (RTA 1987) for failure to pay the claims awarded under the earlier judgment, and decision was given H in favour of the plaintiffs. The present appeal was brought in respect of this second proceedings. The crux of the claim in the present appeal was based on estoppel by representation. The defendant claimed that the appearance was entered and the action was defended in order to prevent a judgement in default from being entered. It was submitted that there I were no documents available to indicate the terms and policies of the insurance that could have been issued by the defendant company. The

plaintiffs claimed that the particulars in P1 identified the defendant as the insurers. It was submitted that the defendant's solicitors conduct in continuing to defend the actions and the failure of the solicitors to refute the liability on the claim amounted to an estoppel by representation.

Held (allowing the appeal with costs):

(1) Estoppel by representation operates where a representation of fact has been made. There is a need for the plaintiffs to have acted on the representation. The representation must be clear and unequivocal. It is possible to make a representation by conduct so long as it is sufficiently unequivocal. (paras 14, 15 & 16)

(2) The plaintiffs were relying on estoppel by conduct where the following elements could be considered, that is, a person by his declaration/act/omission intentionally caused or permitted another person (i) to believe a thing to be true (ii) to act upon such a belief. If this is established then neither the person nor his representative shall be allowed to deny the truth of that thing in any suit or proceeding between himself and such person. (para 19)

(3) In the circumstances of this case, the plaintiffs were unable to invoke the provisions of s. 115 Evidence Act 1950 in order to establish estoppel. It was not borne out in evidence that it was the respondents who had intentionally caused or permitted any person to believe that they were in fact the insurers. The belief that was held by the plaintiffs stemmed from P1. (para 28)

(4) No estoppel by representation will be allowed to be raised if the effect is to negate the operation of a statute. To accept P1 as a statement to verify the truth of the particulars would operate against the requirements of the RTA 1976 which actually requires strict proof on the question of the claim against the insurers. (para 39)

(5) It was not the defendant that had deliberately contributed to the particulars in P1 and no evidence was shown that the defendant could have known of the mistake during the first proceedings and was taking undue advantage. There was here a unilateral mistake which was acted upon by the plaintiffs and not the defendant. The plaintiffs could not rely on the issue of estoppel by representation to establish the claim against the defendant. (paras 41 & 42)

Case(s) referred to:

Capital Insurance Bhd v. Kasim Mohd Ali [1996] 3 CLJ 19 CA ***(refd)***
Carr v. London & North Weston Rly Co [1875] LR 10 CP 307 ***(refd)***
Dixon v. Kennaway & Co [1990] 1 Ch 833 ***(refd)***
Hopgood v. Brown [1955] 1 WCR 213 ***(refd)***

Industrial & Commercial Realty Co Ltd v. Merchant Credit Pte Ltd [1980] 1 MLJ 208 ***(refd)***
John Edwards & Co v. Motor Union Insurance Co Ltd [1922] 2 KB 249 ***(refd)***
KPM Khidmat Khid Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***
Loo Keck Leong v. PP [1992] 3 CLJ 1332 SC ***(refd)***
Low v. Bowverie [1891] 3 Ch 82 CA ***(refd)***
Periasamy Periathamby v. South East Asia Insurance Bhd [1995] 2 AMR 1536 HC ***(refd)***
Public Textiles Bhd v. Lembaga Letrik Negara [1976] 2 MLJ 58 ***(refd)***
Sidney Bolsom Investment Trust Ltd v. E Karmios & Co (London) Ltd [1956] 1 QB 529 CA ***(refd)***
Soole v. Royal Insurance Co Ltd [1971] Lloyd's Rep 332 ***(refd)***
Syarikat Batu Sinar Sdn Bhd & Ors v. UMBC Finance Bhd & Ors [1990] 2 CLJ 691 HC ***(refd)***
Teh Poh Wah v. Seremban Securities Sdn Bhd [1996] 4 CLJ 16 CA ***(refd)***
The Bankruptcy Notice [1924] 2 Ch 76 ***(refd)***
The English Case of City Tailors Ltd v. Evans [1921] 38 TLR 230 ***(refd)***
The Exchange Securities & Commodities Ltd [1988] Ch 46 ***(refd)***
The Indian Endurance (No. 2) Republic of India & Anor v. India Steamship Co Ltd [1996] All ER 641 ***(refd)***
The Winson [1980] Lloyd's Rep 213 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 5, 14, 65, 114(e), 115
Road Transport Act 1987, ss. 91(4), 96(1)

For the appellant - Suresh G Sreedharan; M/s Kanaga, Suresh & Co
For the respondents - Tan Jin Wah; M/s Tan & Tan

Reported by Amutha Suppayah

JUDGMENT

Heliliah Mohd Yusof J:

[1] This was an appeal from the decision of the Sessions Court dated 20 Mac 1999 whereby judgement was entered against Pacific and Orient Co. Sdn. Bhd. (the appellant/defendant) as insurers. The case against the defendant rested primarily on the issue of estoppel.

[2] It is useful to mention the factual matrix as follows:

(i) On 30 July 1989 there was an accident involving the motor vehicle No. JBT 1288 and another motor vehicle WAA 5300 as a result of which several persons were injured. The firm Messrs Tan & Tan acted for all the injured victims.

(ii) The plaintiff's solicitors sent a notice of commencement of proceedings to the insurance co. of M/s Pacific Insurance Co. Sdn. Bhd. pursuant to s. 96(1) of the Road Transport Act 1987.

(iii) According to the Record of Appeal [or RA] the firm of Messrs Taye & Co wrote on 22 February 1992 a letter to Messrs Tan & Tan. In that letter the former stated the firm had been appointed by Pacific and Orient Insurance Co. Sdn. Bhd. as solicitor to the defendant. The letter stated *inter alia*

> "Kami baru dilantik oleh Pacific & Orient Insurance Co. Sdn. Bhd. sebagai Peguamcara Defendant dalam tuduhan tersebut". The letter also stated that the firm had instruction to accept service and the plaintiff were told to forward all the relevant documents.

(iv) On 25 February 1992 Messrs Taye & Co. wrote another letter to the plaintiff/respondent firm requesting for a copy of the RIMV Certificate on motor WAA 5300 in order enable the client Pacific and Orient Co. Sdn. Bhd. (appellant/defendant) to comfirm the civerage. The brief letter stated:

> Further to our letter of 22-2-92 please let us have a copy of the RIMV certificate on motorcar No. WAA 5300 to enable our client to confirm coverage.

[3] According to p. 178 of RA, Messrs Tan & Tan had sent, *inter alia,* a copy of the Jabatan Pengangkutan Jalan search report together with the covering letter dated 2 March 1992.

[4] On 16 March 1992 the appellant/defendant's solicitors were served with the summons and statement of claim. It is necessary to state that at that material time the civil suit that was being instituted was still against one Raja Ali bin Raja Ahmed and Haji Mohd. Hasibullah bin Mahmood (the then defendants).

[5] On 19 March 1992 the counsel for the defendants then entered appearance for Sessions Court Cases No. 53-25/92, 53-26/92. In all the covering letters in which counsel for the defendants had enclosed the notices of appearance and the defence, the letters were also copied to the Pacific & Orient Insurance Co. Sdn. Bhd. (the present appellants).

[6] The next document that was highlighted was the letter on the 21 March 1992 where the solicitors of the defendants had informed the plaintiff's solicitors that the vehicle that was involved in the accident was not insured by Messrs Pacific & Orient Insurance. In that same letter a request was also made for a copy of the alleged insurance cover note (p. 190 RA). The plaintiff's solicitors then had replied (p. 192 RA) that they did not have a copy of the client's cover note and that the particulars of the insurance cover "are as per the JPJ certificate".

[7] It was pertinent then to note that the plaintiff's solicitor had relied on the JPJ certificate P1 without an actual cover note being produced throughout the trial.

[8] On 12 October 1994 the Sessions Court Judge (the first proceedings) gave a decision which determined, *inter alia*, the question of liability. On 21 October 1994 a notice of appeal against the decision was filed. On 1 June 1995 an action was filed against the present appellant pursuant to s. 96 of the Road Transport Act 1987 (RTA 1987) for failure to pay the claims awarded under the Sessions Court judgment of 12 October 1994. The proceedings on this claim were heard before different Sessions Court Judges. The decision was delivered on 20 Mac 1999 in favour of the plaintiff against the present appellant (the second proceedings).

[9] This appeal was heard in respect of the second proceedings.

[10] The RA disclosed that the object of the first proceedings was to establish the rights or liability of the plaintiffs and defendants then. As that time it could not be said that the appellants were already liable under the insurance policy that was alleged. The crux of the respondent's claim against the appellants in the present appeal was based on estoppel.

[11] What had been relied on was essentially P1 a document issued by the Jabatan Pengangkutan Jalan (or JPJ). In the first proceedings it would appear that as result of a request from the solicitors of the plaintiffs JPJ had issued P1. Apparently the appearance had been entered by counsel for the then defendants and the action against them were defended in order to prevent a judgement in default from being entered.

[12] There were no documents available in the present appeal to indicate the terms and polices of the insurance that could have been issued by the insurance company. The court will therefore not respond to the question whether the same solicitors should appear for both the defendants in the first proceedings and the insurance company as insurers for the defendants in the second proceedings. Nevertheless Taye & Co had acted on the instructions of the insurance company to defend the then defendants.

[13] In the second proceedings against the insurers the respondents in the present appeal relied on the issue of estoppel by representation. It is pertinent to note that no mention was made whatsoever of the possibility of negligence. What was asserted essentially was that the particulars in P1 identified the appellants as the insurers for the defendants in the first proceedings. Implicit in the arguments of

plaintiff/respondents in the present appeal was that the conduct of the solicitors for the defendants in continuing to defend the actions and the allegations that the solicitors did not indicate anything to refute the liability on the claim amounted to an estoppel by representation. It is necessary however to bear in mind that there were actually two proceedings and it is necessary to determine whether throughout the advent of the two proceedings the appellants had made statements and conducted themselves such as to represent that they were the insurers who would be liable on the claim as insurers. The relevant provisions of the RTA 1987 are also not to be overlooked as those are statutory provisions which also have a bearing on the issue of a claim made by third parties against insurers. There were certain documents which have been relied upon by both the parties. It would appear that the Sessions Court Judge who had made the decision in the second proceeding had accepted the arguments of the counsel for the plaintiff/respondents on the issue of estoppel by representation on the basis of written submission. The Sessions Court Judge who made the decision was not the judge who presided over the trial itself. Essentially the issue is whether estoppel by representation had been established.

[14] Estoppel by representation operates where a representation of fact has been made. There is also a need for the plaintiff to have acted on the representation. In this appeal it was contended that the plaintiff/respondent had proceeded on the basis that the conduct of the appellant's solicitors then Taye & Co. had led them to believe that the appellants were the insurers.

[15] There are elements of representation which have to be considered. The line of judicial authority support the view that the representation must be clear and unequivocal: *Low v. Bowverie* [1891] 3 Ch. 82 CA at, 113 *Sidney Bolsom Investment Trust Ltd v. E Karmios & Co (London) Ltd* [1956] 1 QB 529 CA per Denning KJ at 540, *Lowe v. Lombank* [1960] 1 WLR 196 CA per Lord Diplock at 205.

[16] It is possible to make a representation by conduct so long as it is sufficiently unequivocal *Carr v. London & North Weston Rly Co* [1875] LR 10 CP 307, 317. *Dixon v. Kennaway & Co* [1990] 1 Ch. 833 per Forwell J at 838. *Hopgood v. Brown* [1955] 1 WCR 213 per Evershed MR at 224.

[17] Counsel for the respondents had also referred to s. 115 of the Evidence Act 1950 which provides

A When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

B

ILLUSTRATION

A, intentionally and falsely leads B, to believe that certain land belongs to A, and thereby induces B, to buy and pay for it.

C The land afterwards becomes the property of A, and A, seeks to set aside the sale on the ground that at the time of the sale he had no title.

He may not be allowed to prove his want of title.

D **[18]** The line of authorities in Malaysia also indicate that the doctrine of estoppel has been applied per Choor Singh J in *Industrial & Commercial Realty Co Ltd v. Merchant Credit Pte Ltd* [1980] 1 MLJ 208, 209 at 223 per Peh Swee Chin in *Syarikat Batu Sinar Sdn Bhd & Ors v. UMBC Finance Bhd & Ors* [1990] 2 CLJ 691 HC per Gopal Sri Ram, *Teh Poh Wah v. Seremban Securities Sdn Bhd* [1996] 4 CLJ 16 CA.

E

[19] By referring to s. 115 the respondents in the present appeal were relying on estoppel by conduct where the following elements could be considered that is a person by his declaration act omission intentionally caused or permitted another person (i) to believe a thing to be true F (ii) to act upon such a belief. If this is established then neither the person nor his representative shall be allowed to deny the truth of that thing in any suit or proceeding between himself and such person.

[20] The respondents had also contended that after acknowledging documents (including P1) to be incorporated as part of the bundle of G documents for purposes of the first proceedings, the appellants were to be inferred to have displayed conduct which were tantamount to silence or a form of acquiescence and were therefore estopped from denying the truth of the particulars in P1 which identified them as insurers.

H **[21]** In this context I find it useful to refer to certain specific passages from the judgement of Raja Azlan Shah F (as His Highness then was) in *Public Textiles Bhd v. Lembaga Letrik Negara* [1976] 2 MLJ 58 p. 60-61.

I The doctrine of estoppel is enacted in section 115 of the Evidence Act, 1950, which is in *pari materia* with section 115 of the Indian Evidence Act. Of the latter it is conceded that the law it enacts is the same as English law: see Sarat *Chunder Dey v. Gopal Chunder Laha.* (3). It seems to me that what was there said in relation to the Indian

Evidence Act must apply a *fortiori* to our Evidence Act. Our Evidence Act which gets its inspiration from the Indian Evidence Acts does not therefore enact as law anything different from the law in England on the subject of estoppel, and English decisions on the subject are relevant to the determination of questions arising for decision under the Act.

…

…

On the case law I need only refer to the speech of Lord Wright in the Privy Council case of *Mercantile Bank of India, Ltd. v. Central Bank of India,* Ltd.(4) where after recalling Blackburn J's dictum in *Swan v. North British Australasian Co.* (5) that "it must be the neglect of some duty that is owing to the person led into the belief concluded that estoppel by negligence must always depend upon the existence of a legal duty owed by him who is sought to be estoppel to the person raising the plea.

Therefore, mere silence cannot operate as an estoppel unless it is established that there is a duty to speak or act. Then deliberate silence or inaction becomes equivalent to a representation as much as if a representation has been made by express language or positive acts. I propose to refer only to *Greenwood v. Martins Bank Ltd.* (6) as it affords a good example of a whole line of cases on the subject. In that case the husband owed a duty to the bank to disclose his wife's forgeries when he became aware of them so that the bank could take steps to sue the forger, but through his silence or failure to disclose the bank was prevented from taking action against the forger. In an action by the husband against the bank to recover the sums of money paid out by the latter on account of his wife's forgeries, the husband, because of his silence or failure to disclose the forgeries which he was under a legal duty to do, was held estopped from asserting the cheques were forgeries. Scrutton LJ in the Court of Appeal (7) states the principle with great precision:

> The classic exposition of the principle of estoppel is that given by Parke B, in delivering the judgement of the Court in *Freeman v. Cooke.(8)*. He cites the rule in *Pickard v. Sears* (9): "That, where one, by his words or conduct, willfully causes another to believe in the existence of certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And continues, "The principle is stated more broadly by Lord Denman, in the case of *Gregg v. Wells,* (10) where his Lordship says, that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

Lord Tomlin in the House of Lord [1933] AC on page 58 said:

> The appellant's silence, therefore, was deliberate and intended to produce the effect which it in fact produced – namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellant's wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me, present all the elements essential to estoppel.

In my view, the so-called cases of estoppel by negligence are associated with those cases in which the silence of one under a legal duty to speak or act is regarded as the representation, and it is a breach of that duty which is relied upon as creating an estoppel. But where there is an express representation made by or on behalf of the representor, negligence as a necessary element in estoppel is not relevant. The judgment of Browne LJ in *Moorgate Mercantile Co. Ltd. v. Twitchings(11)* contains a valuable exposition of certain features of the law. He said (page 326):

> In my view, negligence is not a necessary element in estoppel where there has been an express representation made by or on behalf of the representor. Negligence, and therefore duty, are relevant where a party is alleging that silence or inaction amount to a representation, because in such cases he must establish a duty to speak or act: see Spencer Bower, and e.g. *Greenwood v. Martins Bank Ltd.*

[22] The element of a clear, unambiguous and unequivocal representation is the first issue to be considered. Reliance had been emplaced expressly on document P1. Before the first proceeding on the question of liability took place Taye & Co through the letter P4 (p. 719 RA) had manifestly indicated they had been appointed as solicitors for the purposes of defending the claim against the then defendants who were involved in the accident.

[23] The question here is whether the appellants or their solicitors had made statements or displayed conduct that they agreed with the particulars in P1 The respondents had not adduced evidence that the solicitors were acting as agents for the insurers other than as solicitors. It was submitted that in accepting P1 to be part of the bundle of documents the appellants were to be inferred to have displayed conduct which were tantamount to silence and thereby to have accepted the statement in P1. This is overstretching the purposes for which documents are agreed upon for the purposes of evidence. P1 had been accepted for the purposes of the first proceedings where the main issue was to establish liability for the accident.

[24] The question was whether the silence that was alleged of Taye & Co. had lulled the appellants solicitors into a sense of security and into believing that the appellants were indeed the insurers. This statement in P1 in my view was not capable of reasonably being construed as a clear unequivocal representation, In the first place the respondents who were raising the estoppel were the very persons who had procured the statement from the JPJ.

[25] Moreover the chain of letters that had been referred to above indicated that the solicitors for the defendants in the first proceedings had requested for a cover note. This therefore could not be described as unequivocal conduct to concede acceptance of contents of P1. The reliance of P1 as a document was also related to the provisions of the Road Transport Act 1987. In other words the statement from the JPJ does not operate independently of itself without reference to the specific provisions in the Act 1987. The decision of the Court of Appeal in *Capital Insurance Bhd v. Kasim bin Mohd. Ali* [1996] 3 CLJ 19 CA is still directly relevant. In that case a letter from JPJ which had stated that an insurance policy had been issued was still not accepted as fulfilling the requirements of s. 96(1) of the RTA 1987.

[26] The respondents contended that P1 had complied with the requirement of s. 96(1) of the RTA 1987. Pursuant to the allegation here was that P1 had been delivered to the appellants and that it was in conformity with s. 96(1) of the RTA 1987. Reference has been made to s. 114(e) of the Evidence Act 1950 based on the decision in *Periasamy a/l Periathamby v. South East Asia Insurance Bhd.* [1995] 2 AMR 1536. However in the present case the presumption is not applicable since there was evidence adduced by the appellants to displace the presumption. In *Loo Keck Leong v. PP* [1992] 3 CLJ 1332 SC, 182 Pek Swee Chin SCJ (as he was then) stated:

> This presumption is of course a rebuttable and optional presumption, based upon the common experience of mankind. It is applicable having regard to the facts and circumstances of each case, and especially the absence of objection from the party to whom such presumption could be detrimental.

[27] The evidence of SD2 indicated that there was some irregularity in the details or particulars that was stated in P1. SD2 had indicated that the relevant files at the material time that the accident occurred was not situate in Kuantan. It cannot therefore be said that the Court could take judicial notice that everything was done regularly and therefore the presumption under s. 114(e) was capable of being displaced. The respondents in the present appeal contended that the appellants by their conduct had not indicated their disagreement with the contents of PL

Reference could be made to the decision in *The Indian Endurance (No. 2) Republic of India & Anor v. India Steamship Co Ltd* [1996] All ER 641, 653 per Staughton LJ.

> As to estoppel by acquiescence, the parties are agreed that the test is to be found in the dissenting speech of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1976] 2 All ER 641 at 645-646, [1977] AC 890 at 903:
>
> > In order that silence or inaction may acquire a positive content it is usually said that there must be a duty to speak or to act in a particular way, owed to the person prejudiced ... What I think we are looking for here is an answer to the question whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the "acquirer" of the property, would expect the "owner" acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known ...
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> See also *Pacol Ltd v. Trade Lines Ltd, The Henrik Sif* [1982] 1 Llyod's Rep 456 and The Stolt Loyalty [1993] 2 Lloyd's Rep 281 at 290, where Clarke J said:
>
> > I agree ... that the court should indeed be careful before acceding to arguments which assert duties of disclosure in new situations. I also accept the points he makes that Clyde & Co. are experienced solicitors and that there can be no general duty upon one party to litigation or potential litigation to point out the mistakes of another party or his legal advisers. However each situation must be judged in the light of its particular circumstances.
>
> As Mr Rokison put it, a party to litigation is not obliged to be the nursemaid of his opponent, at any rate if the opponent is not an untutored individual but as well acquainted with commercial litigation as the government of India. The law does sometimes impose a burden on solicitors and counsel to help their opponent's case; but the burden should only be imposed when it is truly necessary, as otherwise, to quote Griffiths LJ in *Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1982] 3 All ER 394 at 404, [1983] 1 AC 854 at 879, the client will be tempted to ask: 'Whose side are you on?'.

[28] In the circumstances of this case it is therefore found that the respondents are unable to invoke the provisions of s. 115 Evidence Act 1950 in order to establish estoppel. It was not borne out in evidence that it was the appellants who had intentionally caused or permitted any person to believe that they were in fact the insurers. The belief that was held by the respondents that stemmed from P1. The respondents also

relied on the action taken to defend the first proceedings as conduct which amounted to a representation that the appellants were indeed the insurers as stated in P1.

[29] In the case of *Soole v. Royal Insurance Co. Ltd* [1971] 2 Lloyd's Rep 332 a similar issue such as this arose. The question was whether in defending the question or determination of liability it therefore follows that the insurer was representing that there might be a claim under the policy which it might meet. Mr Justice Shaw held that there was no unequivocal representation by the insurer that the claim which was the subject matter of the proceedings as one which must give rise to a liability to indemnify the insured but only a representation that the claim may give rise to such liability. It could not therefore be said here that was as unequivocal representation since the fact of who constituted the insurance company emanated from a certificate. The conduct of solicitors then in defending the then defendants could be described as colourless since it could indeed subject them to a judgement being entered in default of appearance.

[30] The case of *'The Winson'* [1980] Lloyd's Rep 213 CA at 223 decided that a statement that the alleged promisor had been advised by its solicitors to believe that it was liable does not amount to a promise that it was liable. However no such situation was found here. The circumstances surrounding the first proceedings and second proceedings did not disclose that the appellants were silent or inactive. The evidence also did not show that the appellants or the counsel were capable of being aware or made to be aware that P1 was erroneous. The evidence showed that there were continuous efforts to verify the contents of P1.

[31] The appellants had also relied on certain documents in respect of which admissibility was opposed. It had not been disputed that defendants involved in the accident that is the alleged insured did not make themselves available. If indeed as submitted by the counsel for the respondents it was simple and easy to obtain the documents then the difficulty of obtaining the particulars of the assured was also attributed to the absence of the cover note which was the actual requirement of the law. However the unfortunate part of the second proceedings was that there were also two changes in the presiding Sessions Court Judge and consequential upon which inconsistent ruling were also made in respect of the issue of the admissibility of documents.

[32] The evidence of SD3 the JPJ Officer comprised direct evidence on certain files related to the question of the insurance policy having been sent to the JPJ headquarters and he had conceded that there had been made a mistake.

[33] During the second proceedings even if there was reliance on a presumption the plaintiff's still had to prove on a balance of probabilities that the appellants were indeed the insurers including the required compliance with the law. With the absence of the actual cover note it was therefore clear that the crux of the plaintiff's case remained throughout on P1.

[34] The admissibility of D21, D22 which indicated evidence that the appellants were not the insurers during the period of the accident had been strongly opposed. Section 65 of the Evidence Act 1950 (Act 1950) specifies that documents must be proved by primary evidence. Primary evidence means the document itself had to be produced for the inspection of the court.

[35] The appellants had also introduced certain documents P24, P25, P26 the admissibility of which had been opposed by the respondents. The appellants relied on s. 65 of the Evidence Act 1950 which enumerates instances when secondary evidence may be given of the existence, condition or contents of document admissible in evidence. The paragraph to be considered is para (c). In *KPM Khidmat Khid Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1 SC (s) per Mohamed Dzaiddin (SCJ) (as he then was) stated:

> Thus, basically, secondary evidence of the contents of a document is inadmissible, until the non-production of the original is first accounted for, so as to bring it within one or other of the cases provided for in the section.

[36] In the case before me in the second proceedings SP 2 had given evidence that even until the trial the appellants had not been able to confirm that they were the insurers. At p. 94 of RR SP 2 gave evidence that Taye & Co had not been able to confirm the cover note. The RR indicated that the Sessions Court Judge who presided at the trial had been satisfied that the documents pertaining to the insurance were lost as apposed to then belief of SP2 who had expressed an opinion.

[37] The first defence witness had given to my mind a reasonable explanation for the inability to obtain an original copy of a cover note or the insurance documents. Moreover if there was indeed a copy of the original cover note it should have been furnished by the then defendants who had apparently made themselves scarce. SD2 had indicated that the JPJ had made a mistake. Since it was the plaintiffs who first had to establish their case the appellants had therefore brought forth a reasonable explanation which included through the evidence of SD3 of the need for the appointment of adjusters. The conduct of the appellants in seeking verification on the alleged policy was also explained

through the evidence of SD4. Sections 5 and 14 of the Evidence Act 1950 could also be invoked to consider the relevance of P24, P25, P26. These documents were to be considered not necessarily for the purpose of establishing the truth of the contents but also for the purposes of explaining the fact that appellants had undertaken steps to verify the existence of a cover note or insurance policy in relation to the alleged contents of P1.

[38] The respondents had not on a balance of probabilities established that P1 could be the basis of the claim in view of the provisions of s. 91(4) read with s. 96(1) of the RTA 1987 which respectively as follows:

91. Requirements in respect of policies

(4) A policy shall be of no effect for the purposes of this Part unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Act referred **to as a "certificate of insurance")** in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.

96. Duty of insurers to satisfy judgements against persons Insured in respect of third party risks.

(1) **If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgement in respect of any such** liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement a sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating in interest on judgements.

[39] While the definition of a certificate of insurance includes a cover note, P1 was not such a document. No estoppel by representation will be allowed to be raised if the effect is to negate the operation of a statute: *The Bankruptcy Notice* [1924] 2 Ch 76 at 97-8 per Artkin LJ. The Exchange Securities & Commodities Ltd [1988] Ch. 46, 57-60 per Harman J. To accept P1 as a statement to verify the truth of the particulars would operate against the requirements of the RTA 1976 which actually regular strict proof on the question of the claim against the insurers.

[40] Some reference has been made to the issue of subrogation. In view of my conclusion that estoppel was not established on a balance of probabilities it becomes unnecessary to dwell further on this issue. However for the sake of completeness that matter could be alluded as follows, that is, to state that reference to it was misplaced and may have contributed to a misdirection on that part of the decision of the Sessions Court Judge. The English Case of *City Tailors Ltd v. Evans* [1921] 38 TLR 230 could be referred to. Scrutton LJ in referring to an insurer's right of subrogation had said "when he has paid, and not till then, he is subrogated to any legal rights the assured had which might reduce the loss, but not to any charitable contributions or sources of profit not depending on legal rights". FR Hardy Ivamy in his treatise on Principles of Insurance Law had referred to the abovementioned case as well as the case of *John Edwards & Co. v. Motor Union Insurance Co. Ltd.* [1922] 2 KB 249 at 245 per Mc Cardie: "In my view the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract if indemnity. As stated by *Ivamy (supra)* the right of subrogation does not arise unless and until the insurers have admitted the assured's claim and have paid the sum payable under the policy."

[41] The counsel for the respondents had also led arguments on the question of detriment resulting from the reliance on the details in P1 However it was not the appellants that had deliberately contributed to the particulars in P1 and no evidence was shown that the appellants could have known of the mistake during the first proceedings and was taking undue advantage. The court does not find evidence to show that the appellants did not protest or dispute the contents of P1 In other words there was here a unilateral mistake which was acted upon by the respondents and not the appellants.

[42] In my view the respondents could not have relied on the issue of estoppel by representation to establish the claim against the appellants. The appeal was therefore allowed with costs.